No. 92-74

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,

Petitioner,

v.

ACF INDUSTRIES, INC., et al.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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At the core of the disagreements between the parties are fundamentally different views of what problem Congress set out to solve in enacting 49 U.S.C. § 11503(b). Respondents and their amici persistently describe the statute as designed to address "discriminatory taxation" in all conceivable shapes and forms. Their central theme is that the States had long engaged in broad-ranging "discriminatory taxing" practices, and that they were determined to continue them so long as any opportunity to do so remained. In respondents' view, the statute was to serve as an open-ended prohibition on "discriminatory taxes," one that would provide a complete solution to all present and prospective problems of "discriminatory" state taxation.

That interpretation is simply unfounded. Congress was not presented with nor did it consider a broad array of discriminatory taxing practices. Rather, Congress was asked to address and did address only the discrete problem of direct over-taxation of

railroads resulting primarily from inflated assessments and special rates.

This reply brief supplements the arguments made in our opening brief by focusing on some of the weaknesses in the support respondents offer for their view of Congress's objective. Particularly important among them is respondents' unarticulated assumption that the exemption of property owned by others equates with the direct overtaxation of property owned by railroads. Respondents argue, but they do not show, that when enough non-railroad property is exempt, railroads are forced to shoulder an additional tax burden that they are politically powerless to do anything about. While that effect may result from direct overtaxation of railroads, the practice that concerned Congress, the undertaxation or non-taxation of property owned by other taxpayers has a very different impact. The "discriminatory" burdens that concerned Congress do not flow, either obviously or necessarily, from ordinary State exemption practices, and it cannot be assumed that exemptions are "discriminatory" in the sense that Congress used the term.

A. The Statute Was Designed To Address Specific Overtaxation Practices, Not Discrimination "In All Of Its Guises."

A full and fair reading of the legislative history[1] easily refutes several of the misimpressions respondents create (*e.g.*, the image that the States vigorously fought all efforts to equalize taxes on railroad property;[2] that nearly every State was involved in a conspiracy-like effort to place special tax burdens on rail-

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[1] Significantly, neither respondents nor their amici take issue with any portion of our description of the legislative history. (Pet. Br. 13–24).

[2] The States frequently expressed support for the general objective of equalizing taxes on railroad property. For example, Oregon officials commended the purpose of the bill and doubted it would have any real application to Oregon because Oregon already had in place an effective process to equalize common carrier property. *Hearings on S. 2289 before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong. 1st Sess. 76, 82 (1969) (letter of Oregon Tax Commission; statement of Gov. Tom McCall).

roads;[3] that the longer Congress delayed, the more oppressive the States' tax practices became;[4] and that the Congress turned a mostly deaf ear to the various concerns the States' raised about the legislation[5]). Given respondents' heavy reliance on their thesis that the statute is addressed to "discrimination in all of its guises," a few supplemental observations bearing on the scope of Congress's "remedial" objective are worthwhile.

1. Respondents persistently refer in generalized terms to congressional concerns with "discriminatory taxation," and they suggest that Congress's focus was general and sweeping from at least the time of the Doyle Report in 1961.[6] But it is only

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[3] Actually, the bill was aimed at a minority of States. *E.g.*, S. Rep. No. 1483, 90th Cong., 2d Sess. 14 (1968) ("In the majority of States that now grant equal justice to all taxpayers State property tax assessments, collections or rates would in no way be affected by passage of this bill.") Documents that the AAR submitted to Congress in 1972 identified 16 States that overtaxed railroad property. *E.g.*, S. Rep. No. 1085, 92d Cong., 2d Sess. 7 (1972). And although respondents are quick to point out that 12 of those 16 States are before the Court as amici supporting Oregon (Resp. Br. n.3), they decline to note that Oregon was never identified, in that list or otherwise, as a State with excessive railroad taxation practices. *See also* Doyle Report, at 487 (listing 33 States; Oregon not listed).

[4] At the time of the Doyle Report, the industry estimated that railroads were being annually overassessed approximately $141 million nationwide. S. Rep. No. 445, 67th Cong., 1st Sess. 487 (1961) (Doyle Report). The overall amount of overtaxation cited by the railroad industry decreased with each successive bill until, by the time of the bill's passage, it had shrunk to only $50 million despite 15 years of inflation. *E.g.*, H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

[5] Nearly all of the States' collective efforts to narrow the bill met with success. The only unsuccessful effort respondents and their amici cite was the so-called "Tennessee amendment," which was sought primarily by the State of Tennessee to meet its particular concerns. *See generally* Pet. Br. n. 28. Unlike the many changes made at the States' behest, this amendment would not have narrowed the scope of the statute, but instead would have immunized a State from suit under the statute if it had a then-existing constitutional provision allowing for "reasonable classifications" of property.

[6] For example, respondents assert that "[f]or decades, States took advantage of the railroads' vulnerability to discriminatory taxes," and they point

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through the imprecision of their terms that respondents can attribute to Congress an overall objective (the wholesale eradication of any and all "discriminatory taxing" impacts and practices) for which there is no evidence. Congress's focus from the beginning was narrow and precise. It was always on particular practices that resulted in inflated state taxes levied directly on railroad property. The Doyle Report did not deal with "discriminatory taxation" in general; nor did it accuse States of engaging in varied and broad "discriminatory" taxing practices. It was concerned — specifically and only — with excessive assessments.[7] When the railroad industry introduced one of the first post-Doyle Report bills in Congress, it explained that the legislation was "very narrowly drawn" and was directed to "a type of discrimination" only.[8] The railroad industry specifically advised Congress that the objective was not to address all concerns the industry might have with state taxing practices, but only the most "pressing and persistent" problem of excessive assessments on railroad property.[9] It urged that the purpose of the bill was to close "only one loophole (but an extremely important one) in the overall tax structure as it applies to the

[5](...continued)
back to the 1961 Doyle Report and a 1944 report to the 79th Congress as proof. Resp. Br. at 2–3. Similarly, respondents assert that the Doyle Report was followed by a series of hearings to consider "legislation addressing state tax discrimination," that year after year Congress found that "discrimination persisted," and that eventually Congress concluded that "state tax discrimination was indeed widespread" and must be ended. Resp. Br. 3.

[7] The Doyle Report could not have been more precise in identifying the state taxing practices it considered discriminatory. The problem was in assessments of railroad real property only. Doyle Report, at 457–91.

[8] *Hearing on H.R. 10169 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Comm.*, 88th Cong., 2d Sess. 29, 31 (1964).

[9] *Id.*, at 18, 31, 51. *See also* Doyle Report, at 449–59 (identifying a broad range of state taxes and taxing practices that were not of concern).

railroad industry. Other tax problems confronting the railroads can be dealt with as they become more urgent."[10]

To be sure, in the years that followed, Congress added two additional provisions to ensure that railroad taxes would be equalized effectively. Because the amount of tax paid on property is a consequence of two factors (assessment multiplied by rate), the proposed legislation was modified to include overtaxation through excessive rates. Congress still viewed the legislation as directed to specific overtaxation practices, rather than the broad universe of all possible tax practices or impacts, as the very sources respondents cite for their more sweeping statements make clear. *See, e.g.*, S. Rep. No. 630, 91st Cong., 1st Sess. 9 (1969) (the statute is directed to "a type of discrimination or burden" and declares specific "types of actions" to constitute an unreasonable and unjust discrimination against interstate commerce). And eventually Congress added a subsection addressed to "other taxes" in addition to property taxes, because at least some railroad property was exempt from property taxes altogether and subject to "in lieu" taxes instead. *See* discussion *post* at pp. 8–12 and Pet. Br. 22–25.

But respondents do not cite so much as one other "discriminatory" tax or taxing practice that the railroads complained of or that Congress considered or addressed throughout the entire 15-year period of congressional deliberations; our review of the legislative history has revealed none. Conspicuously absent from respondents' citations to the voluminous history is a single statement by anyone that this statute would or should address "discriminatory taxes" of all kinds, or "discrimination in all of its guises," or all aspects of the States' taxing structures,

[10] *Hearing on H.R. 10169, supra*, at 51. Similarly, in 1966, an AAR witness told Congress that it did not need to take on "all possible ramifications of the problem of discrimination" and it should make a "cautious advance step by step" in legislating in the area of state taxation of railroad transportation property. *Hearings on H.R. 4972 Before the House Comm. on Interstate and Foreign Comm.*, 89th Cong., 2d Sess. 52 (1966) (Paul Sanders, Law Professor, Vanderbilt Univ., appearing for AAR).

practices and policies. The only direct support respondents offer for that proposition is lower court decisions, and they are no more persuasive than they are authoritative on that point.[11]

2. Respondents thus overstate the congressional purpose to eliminate "discriminatory taxation," while they ignore completely Congress's complementary objective: to preserve certain of the State's taxing prerogatives. Congress was neither unaware of nor indifferent to the difficulties States face in fashioning rational taxing structures. A key prerogative that the States argued to preserve was their ability to draw lines between what is taxed and what is not. As we have described at length, that authority was deemed critical to the States' ability to pursue important economic and social policies, and the examples that States cited included special taxation policies for business inventories, standing timber, motor vehicles, and other property similar to the categories that Oregon exempts.[12] Congress was both sympathetic and responsive to the States' concerns, and eventually it crafted the comparison class to provide a blanket exclusion for all property not "subject to a property tax levy."

Respondents do not dispute the meaning of that language, or the fact that it reflects a deliberate decision by Congress to compare the tax treatment of rail transportation property only to that of other *taxed* business and commercial property.[13] They

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[11] The origin of this view of Congress's broad objective is *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204 (8th Cir. 1981). *Ogilvie* offers no legislative history or other authoritative source for its observation, which was unnecessary to its holding. Lower courts, nonetheless, frequently cite *Ogilvie* and rely on it. Over time, the idea that Congress was seeking to eliminate "discrimination in all of its guises" has, myth-like, continued to be repeated by other courts without an examination of the legitimacy of the source of the statement. *See* Pet. Br. 29–30.

[12] Pet. Br. 16, n. 14 and 32 n. 42.

[13] Amici Interstate Air Carriers (IAC) alone try to argue to the contrary. Their position is that the limitation to property "subject to a property tax levy" was intended only to preserve State authority to have "traditional" exemptions, such as those for government-owned and church property. IAC

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therefore instead attempt to discount the importance of the congressional policy choice the decision reflects.[14] Primarily, they cast off that policy choice as irrelevant, on the theory that it is contained in the comparison class for subsection (b)(1) through (b)(3), which does not directly apply to subsection (b)(4). *E.g.*, Resp. Br. 20. That argument is disingenuous, for three reasons.

First, respondents' position really is that the overall context and structure of the statute must be ignored, and that subsection (b)(4) must be read in isolation. Neither common sense nor precedent supports that artificial approach. *E.g.*, *United Savings Assn. v. Timbers of Inwood Forest Assoc. Ltd.*, 484 U.S. 365, 371 (1988)("statutory construction . . . is a holistic endeavor.") Second, if, as we maintain, Congress made a deliberate policy choice to preserve State authority to determine what is taxed and what is not, that fact critically undercuts respondents' assertion that subsection (b)(4) can and should be used to bring claims of "exemption discrimination." The non-specific language of

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[13](...continued)
Am. Br. 12. That same argument has been made unsuccessfully time and again in circuit courts. *See generally* Pet. Cert. 13–14 and Pet. Br. 26–27 (citing representative cases). It has been rejected for good reason.

First, if Congress intended such a limitation, it plainly did not write it into the statute; the language is unconditional. Second, the limitation to "commercial and industrial property" itself excludes the examples they cite. Third, there is nothing limiting, rather than merely illustrative, about the examples. Finally, the IAC ignores that the railroad industry expressly disavowed any intent to interfere with State exemption policies *of any kind*, and that the railroads themselves offered up a clarifying amendment to ensure that the statute would not interfere with State exemption authority. Pet. Br. 18–19 and n. 2.

[14] Beyond arguing that the comparison class is irrelevant, respondents assert only that the meaning of the "subject to a property tax levy" language is not an issue before the Court. Resp. Br. 21–22. To the contrary, our argument consistently has been that the comparison class excludes exempt property, that it does so for important policy reasons, and that subsection (b)(4) cannot be construed to nullify that congressional choice. Respondents' unwillingness to meet that argument does not mean that it is not an issue in the case.

subsection (b)(4) properly cannot override the policies that Congress expressly sought to preserve elsewhere in the same statute. *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957). Third, respondents' argument ignores their own basis for an expansive reading of subsection (b)(4). They try to draw heavily on the history running from 1961–1972, a period that relates only to subsections (b)(1) through (b)(3), to characterize Congress as providing a complete and comprehensive solution to the problem of "discriminatory taxation." If they want the benefit of that history, however, they must also take its burdens. That history reveals, just as the face of the statute makes plain, that Congress made a deliberate choice to protect State authority to exempt property from taxation without penalty in the form of lowered taxes for railroad property.

3. The question then must be whether Congress's focus and objective became radically more ambitious at some point during the final two years (1974–1976) of its deliberations. That is when, for the first time, Congress was urged to think about overtaxation of railroads as a consequence of some practice other than excessive assessments and rates. Respondents and their amici devote relatively little attention to the specific legislative history that surrounds the addition of subsection (b)(4) to the statute. What attention they give that history casts it in an inaccurate light.

The fourth subsection prohibiting "any other tax that discriminates" against a rail carrier first appeared in a 1974 version of the House legislation.[15] At that time, no substantive significance was attached to the added provision.[16] The language was then added to another House bill (H.R. 5385), which passed the full House. The house report that accompanied the bill expressly described the fourth subsection as "the so-called 'in-lieu

[15] H.R. 12891, 93d Cong., 2d Sess. (1974).

[16] The first bill containing the fourth subsection was treated by all interested parties, including railroad representatives, as identical to a parallel house bill that had no "any other tax" provision in it. *See* Pet. Br. n 30.

tax'" provision.[17] There was no debate or discussion of the fourth subsection on the House floor. The discussion of the section as a whole, however, confirms that after the addition of the "any other tax" subsection, Congress still intended to protect state exemption authority fully, and it still viewed the bill as a product of significant compromise.[18]

Railroad industry witnesses asked the Senate to add a fourth subsection addressed to "in lieu" taxes, and they specifically recommended that the Senate borrow the language that the House had used ("any other tax that discriminates" against a rail carrier).[19] The Senate added the language, in apparent response to those requests. The House and Senate bills went into conference committee containing effectively identical "any other tax" provisions. When the final bill emerged, the accompanying report explained that the committee had largely adopted the Senate version (a description that ran to the whole statute, rather than the "any other tax" provision); the final bill contained the "any other tax" language that had been common to both the House and Senate bills.[20]

[17] H.R. Rep. No. 1381, 93rd Cong., 2d Sess. 35–36 (1974).

[18] Floor discussions show that congressional members understood and intended that state authority to pursue economic and other objectives through tax exemptions would be wholly unaffected by this bill. *See* Pet. Br. 21, n. 27. The discussions also make clear that the bill was not a "cure-all" for the railroads, but instead was a product of significant compromise by all interested groups. Cong. Rec. H. 38733 (daily ed. Dec. 10, 1974) ("[This is]not a perfect piece of legislation because practically every party involved has found something wrong with it, but I claim that it is probably the best piece of legislation that can come out of Congress at this time * * *") (comments of Rep. Kuykendall).

[19] Steven Ailes, President of the AAR, and Stuart Johnson, counsel to the New York Dock Railway, made the request. *See generally* discussion in Pet. Br. 23; Am. Br. State of Washington, et al. 17–21; Am. Br. State of Iowa 9–11.

[20] The House bill prohibited: "The imposition of any other tax which results in discriminatory treatment of a carrier by railroad subject to this part." H.R. Rep. No. 725, *supra*, at 19. The Senate bill prohibited: "The

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Respondents do not dispute that the fourth subsection on the House side was understood to address "in lieu taxes," a phrase that this Court, drawing from that history, has described to mean "taxes applied in lieu of any other possible property tax." *Western Airlines, Inc., v. Board of Equalization*, 480 U.S. 123, 130-32 (1987). Respondents suggest, however, that the fourth subsection incorporated into the Senate bill was intended broadly to address any and all taxes and state taxing practices. They construct their entire claim on what they describe as a "characterization" contained in the conference report. Resp. Br. 22-23. That "characterization" is nothing more than a description of the Senate version of the bill using the literal language of the provision and a description of the House bill using the familiar "in lieu" short-hand.

Respondents' argument would require the Court, first, to accept the proposition that Congress intended the *identical* language used in both the House and Senate bills ("any other tax that discriminates") to have dramatically different meanings.[21] Next, the Court would have to believe that Congress would pick between those different meanings without comment, other than to note that it was adopting the Senate version of the statute as a

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[20](...continued)
imposition of any other tax which results in discriminatory treatment of a common or contract carrier subject to this part I, part II, part III, or part IV of this Act." S. Rep. No. 499, 94th Cong., 2d Sess. 232 (1975). The final version adopted by the Conference Committee prohibited: "The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." S. Rep. No. 595, 94th Cong., 2d Sess. 27 (1976).

[21] The Solicitor General agrees with respondents' view that the adoption of the language in the Senate bill represented a new and broader objective on Congress's part. But the Solicitor does so on the basis of an evident misunderstanding. The Solicitor asserts that although the House bill that went to Conference would have limited section (b)(4)'s application to "in lieu" taxes, the Conference Committee "expanded" the provision by selecting "broader" language from the Senate bill. U.S. Am. Br. (on the merits) at 13-14. Contrary to the Solicitor's suggestion, the pertinent language of the two bills was precisely the same.

whole.[22] Third, the Court would have to accept that Congress would communicate its choice between an all-encompassing purpose and one tailored to a more specific concern merely by describing one bill in terms that tracked the subsection's literal language, and describing the other bill with the short-hand terminology that had come to reflect the narrow meaning attached to the same literal language. Finally, the Court would have to believe that the States, after long and successful efforts to refine the bill, would stand by without comment, objection or dissent when this remarkable transformation took place.

The point is not necessarily to settle the question whether the "any other tax" provision is limited to in lieu taxes, or whether it extends to a broader range of non-property taxes (*e.g.*, payroll taxes, income taxes, etc.). It is enough to observe that the addition of that language did not mark, as respondents suggest, a new congressional objective to address "discrimination in all of its guises," rather than a finite set of concerns. Respondents' argument to the contrary turns completely on the limited and unenlightening notes in the conference committee report. Just as completely, it ignores the explicit and helpful history revealing the meaning of the language on the House side and the purpose in adding that same language to the Senate bill. Respondents' approach serves their argument, but not Congress's intent.

B. State Exemption Policies Do Not Directly Or Uniquely Shift An Added Tax Burden To Non-Exempt Railroad Property.

In our opening brief, we argued that the *per se* rule adopted by the Ninth Circuit cannot be correct given the congressional policy choices reflected in subsections (b)(1) through (b)(3). In

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[22] The Senate bill in fact differed from the House bill in other respects. Significantly, the Senate bill was particularly straightforward in describing the comparison class for both rate and assessments claims through use of a single definition that required comparison properties to be "subject to a property tax levy." *See* Pet. Br. 24. The adoption of the Senate version of the bill served to ensure complete protection for State exemption policies, a fact which in and of itself refutes the purpose respondents try to attribute to Congress's selection of the Senate version.

those subsections, Congress expressly protected state authority to exempt property from taxation without giving railroads the benefit of those exemption policies. To conclude, as the Ninth Circuit does, that "*any* exemption not also available to railroads violates the statute" runs head-long into that clear policy choice. Pet. Cert. App-16 (emphasis original).

Neither respondents nor their amici make any effort to defend the Ninth Circuit's *per se* analysis. Instead, they claim that state property tax exemptions, while perhaps not inherently discriminatory against railroads, take on a forbidden quality when the percentage of exempted property becomes excessive (presumably a majority or more, although respondents decline to be specific).[23] Railroads, they submit, are then forced to bear the burden of replacing revenues lost by tax exemptions that are granted to other personal property owners. Moreover, because railroads represent a minority class of non-resident property owners, railroads are politically powerless to prevent this shift in the tax burden. Respondents argue that the additional tax burden, combined with their political weakness, falls squarely within Congress's broad remedial objective. Not to construe the statute to reach "excessive exemptions" would, respondents and their amici argue, be "absurd," for States would be free to achieve in a new way the very "discrimination" Congress set out to eliminate.

1. Respondents' "absurdity" claim depends entirely on their flawed premise that Congress sought to eliminate "discrimination in all of its guises." To decline to entertain claims of "exemption discrimination" might at least be arguably "absurd" if, as respondents claim, Congress intended the statute to solve all problems of excessive taxation that might ever arise. On the other hand, if Congress intended only to address the particular complaints that the railroads presented, and to consider others "as

[23] Respondents argue that a State's exemptions should be deemed "discriminatory" at the point at which railroads do not have tax equality with "the general mass of business personal property." Resp. Br. at 23.

they become more urgent" (*ante* at p. 5), then limiting the statute's reach to the problems Congress had before it is not absurd at all. There is nothing irrational, illogical or nonsensical about approaching problems one at a time, as their nature and dimensions become known, and as the interests of all affected parties can be identified, debated and balanced. *Cf. Williamson v. Lee Optical*, 348 U.S. 483, 489 (1954) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.")

2. Fundamentally, respondents' argument turns on the unstated assumption that overtaxation caused by excessive rates, assessments and in lieu taxes can be equated with "excessive" levels of exemptions. That argument assumes too much and proves too little. When a State singles out railroad property for high assessments or rates, railroads suffer a unique, direct and measurable burden. No negative consequences flow to any other taxpayer; to the contrary, other taxpayers may realize an incremental benefit in the form of a slightly reduced tax burden. No other taxpayers have incentive to complain, which leaves railroads with little political clout to correct the problem. In short, uniquely high assessments or rates are disfavorable treatment directed specifically and measurably to railroad property.

The same is not true of exemptions. Typically, the tax dollars not collected because certain categories of property are tax-exempt result in an added burden for all other property taxpayers. Because that burden is shifted on equal terms to the remaining property taxpayers, it is significantly diluted. How much any one taxpayer feels the transferred burden, or how politically powerful or powerless the remaining taxpayers are to do anything about it, depends on the size of the pool of taxpayers left to bear the taxes. Exempting property from taxation thus affects railroads altogether differently than levying inflated taxes directly on property that the railroads own.

This case demonstrates the fallacy of equating the impact of a State's exemption policies with the impact of overtaxation through excessive assessments and rates. With mesmerizing

frequency, respondents invoke their claim that 67 percent of "business personal property" is exempt, leaving railroad personal property among the 33 percent that is not. Their argument is designed to suggest (although respondents do not directly assert) that the owners of the remaining 33 percent of *business personal* property must absorb the taxes lost due to the exemptions. They are thus forced to engage in a collateral debate about whether their property should be compared only to other business personal property or to other business personal and real property combined. If they cannot limit the comparison to personal property, they cannot claim to be in a taxed minority, and they fail their own test. As a matter of plain language and statutory intent, they are simply wrong; Congress, in the rate and assessment provisions, did not require railroad personal property to be compared only to other business personal property, or railroad real property to be compared only to other business real property.[24] But more to the point, in determining whether a State has

[24] The express language of subsection (a)(4) requires comparison only to "property" without distinction or, in the original codification, to "all property, real or personal." The report on which respondents rely states only that Congress did not intend to prohibit states from applying different rates or assessments to real and personal property. *See* S. Rep. No. 1483, 90th Cong., 2d Sess. 10–11 (1968). States were concerned that the language would permit railroads to mix the comparison by comparing real property to personal, or personal to real, in those States that distinguish between the two for purposes of rates and assessments. No concern was ever expressed about a combined comparison class in those States that, like Oregon, use uniform rates and assessments for the two categories. The AAR offered an amendment that would expressly have required a comparison of railroad real property only to other real property, railroad personal property only to other property, and so on. Congress declined to adopt it. *Hearings on S. 2362 [and related bills] Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 296–97 (1971, 1972). *See also*, *Hearings on S. 2289 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce*, 91st Cong., 1st Sess. 102 (1969) (amendment requiring comparison of railroad personal property to other business personal property not adopted). Whatever else this history means, it cannot be understood to force a fractured comparison in those States that do not distinguish real and personal property for purposes of rates and assessments.

"discriminated" against railroads by giving tax exemptions to others, respondents' artificial comparison is meaningless.

Although we disagree with respondents' percentages and numbers (as did both lower courts), the claim that Oregon exempts 67 percent of all *business personal* property is, in and of itself, completely unhelpful in determining what disadvantage flows to railroads or to any other taxpayer. In Oregon, real and personal property tax dollars all go into a single revenue pool, so that the additional tax burden caused by the exemption of any category of property shifts to all remaining taxpayers. To whatever extent railroads in Oregon bear higher taxes because of the amount of *business personal* property that is tax-exempt, the increase is necessarily fractional, for it is distributed to the remaining property taxpayers, irrespective of the type of property they own. Respondents' hand-crafted comparison class is designed to create the illusion that the owners of the 33 percent of taxed *business personal* property must bear the tax burden shifted from the owners of exempt *business personal* property. If the universe of taxpayers left to bear the burden in fact were that small, taxes on non-exempt property would triple, and the taxpayers left to bear the burden might be reduced to a politically weak subgroup.

Respondents' picture is, however, wholly inaccurate. For the tax year in question, respondents incurred an approximate 11.5 percent increase in their taxes because of the amount of business personal property that paid no taxes.[25] The increase was not transferred to taxed railroad property alone, or as part of a small and insular group of taxpayers; rather, *all* other owners of taxed property (real and personal, commercial and non-commercial

[25] In 1988, Oregon's entire taxable property base was $84.2 billion. Oregon Blue Book, 205 (1989–90). If the State had taxed the exempt property of which respondents complain, the total tax base would have been $93.9 billion. (84.2 + 9.7 = 93.9). Thus, a property tax base of $84.2 billion dollars was required to absorb the burden that would otherwise have been borne by a tax base of $93.9 billion. Eliminating $9.7 billion from the tax base, therefore, increased the burden on the remaining taxed property by 11.5 percent. ($84.2 billion × 1.115 = $93.9 billion).

alike) incurred the same 11.5 percent increase. Oregon's tax exemption policies, therefore, do not deprive railroads of an "essential political check," as respondents claim. Resp. Br. 28. Nor do they run afoul of Congress's primary objective of maintaining equalized taxes on railroad property.

As a result, it cannot be assumed that Congress would have considered "exemptions" to be "discriminatory" at all. Congress, it is worth remembering, did not set out to protect railroads from taxation, only from taxation that is *uniquely* burdensome and therefore discriminatory. Exemption policies increase taxes for railroads, but not uniquely or unequally. Rather, the burden shifts to other taxpayers in general, so that railroads absorb the burden in combination with all other property taxpayers in the State. Their fate, therefore, remains "tied to the fate of a large and local group of taxpayers."[26] In short, favoring other taxpayers does not translate necessarily or directly into uniquely disfavoring railroads, and lacks the "discriminatory" features of the State overtaxation practices that motivated Congress to enact the statute.

3. Because the impacts of overtaxation and exemption policies are not the same, fears that States will excessively exempt property in an effort to discriminate against railroads are purely fanciful. Respondents try to refute that point by citing a small handful of lower court cases that, in their view, prove that this evil will come to pass. Some of those cases demonstrate other problems with State exemption policies that might be independently subject to direct attack under traditional Commerce Clause standards.[27] Beyond that, those cases merely demonstrate that lower courts have succumbed to the illusion that "excessive

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[26] *Kansas City Southern Ry. Co. v. McNamara*, 875 F.2d 368, 375 (5th Cir. 1987).

[27] For example, in *Ogilvie v. State Board of Equalization*, *supra* and *Burlington Northern Railroad Company v. Bair*, 766 F.2d 122 (8th Cir. 1985), the effect of the States' tax structure was to tax property owned by railroads *because* it was owned by railroads, and to leave the same type of property tax-free if owned by other entities.

exemptions" translate into direct overtaxation of railroads.[28] None of them supports respondents' and their amici's vision of a system in which railroads are left to bear the entire tax burden while all other property owners remain tax free.[29]

4. The difference between the impact of exemptions and that of direct overtaxation highlights another flaw in respondents' position. The remedies Congress designed for excessive rates and assessments are designed to put railroads in the position they would have been in if the State had not engaged in the prohibited overtaxation in the first instance. *See* Pet. Br. 41–45.[30] If the Court concludes that Oregon "discriminates" against railroads as

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[28] *E.g.*, *Trailer Train Co. v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988) *cert. denied*, 464 U.S. 846 (1989).

[29] There is another answer to respondents' fear. Their hypothetical assumes a tax system in which only a few limited categories of property are taxed, and all other property is tax-exempt. That description, of course, is not true of Oregon's system. No one disputes, nor can they, that in Oregon numerous categories of business personal property are taxed, and a vast number of taxpayers are subject to that tax. What respondents really posit is a tax structure that no longer represents a general *ad valorem* property tax system. If Oregon were to structure its tax laws so that only narrow categories of property were taxed and all other property were exempt, the answer might well be that such a tax on railroads would qualify as an "in lieu" tax fully subject to examination under subsection (b)(4). *See, e.g.*, *Western Airlines v. Board of Equalization*, 480 U.S. 123 (1987). Oregon has not done so, however.

[30] The U.S. Solicitor General generally agrees with Oregon that the remedy, if any, should be proportional. We differ where the Solicitor suggests that, in determining what exempt property should be used to reduce the railroads' taxes, the inquiry may turn on whether the owners of that property are required to pay other taxes. U.S. Am. Br. 21–22. In effect, the Solicitor rewrites the comparison class in subsection (a)(4) to exclude only property "not subject to a property tax levy, but subject to equivalent alternative taxation." A State could not, if we understand the Solicitor's position correctly, have wholly tax-exempt property without *per se* entitling the railroads to relief. That position differs little from the Ninth Circuit test the Solicitor purports to reject. The Solicitor may be seeking to strike a new compromise between the interests of the States' and the railroads, but that approach is patently at odds with the plain language of the statute, its history and the compromise Congress endorsed.

a consequence of exeecessive exemptions, the remedy should be the same — *i.e.*, to tax railroads as if the "discriminatory" practice had not occurred. Their claim is that Oregon discriminates against them because the value of the property exempted unfairly shifts to them a tax burden that they are politically powerless to deflect. As we have already discussed, Oregon's policy of exempting $9.7 billion worth of other business personal property has the effect of increasing respondents' taxes approximately 11.5 percent. If they are entitled to any relief at all on the basis of their theory, it should be to remove the added burden, not to remove the obligation to pay any taxes whatsoever.[31]

C. Respondents' Arguments To Limit State Exemption Authority Belong In Congress.

There are answers to all of respondents' arguments. Some are provided by the text and context of the plain language of subsection (b)(4); others are in legislative history that respondents decline to acknowledge; still others are provided by common sense and a practical understanding of the difference between overtaxation of railroads and exemption of others.

When the dust settles, however, respondents' arguments reveal their weaknesses more by the points they do not make than by the points they do. Respondents do not deny that ambiguity in the early legislation caused the States to be concerned that federal courts might interfere with their ability to pursue local goals through tax exemption policies. They do not deny that congressional members repeatedly, and without dissent, expressed sympathy for those concerns. They do not deny that, as sponsors of the legislation, the railroad industry itself neither voiced objection to State exemption policies nor complained that States might abuse their exemption authority if Congress did not limit it. Respondents do not deny that the railroad industry itself never resisted clarifying the bill to meet the States' concerns, or that railroads directly offered up an amendment for that purpose.

[31] If the Court determines some remedy is owing, it appropriately should remand the case to the lower courts to determine the exact amount of reduced taxation that should be ordered.

They do not deny that the "then-most-prevalent"[32] problem of direct overtaxation was the only complaint that the railroad industry ever brought to Congress's attention.

Respondents' real claim is that circumstances have changed, and the Court should construe the statute to meet them. In their effort to have the Court fill a void they believe Congress inappropriately left in the statute, they are preempting a debate that should take place, if at all, in Congress. *See, e.g.*, *Helvering v. Ohio Leather Co.*, 317 U.S. 102, 110 (1942) ("[A]rguments urging the broadening of a tax deduction statute beyond its plain meaning to avoid harsh results are more properly addressed to Congress than to the courts.") The parties could argue long and hard whether railroads should have the benefit of policies that States extend to property such as business inventory and standing timber. We could debate at length whether it should matter that the exemptions are available on the same terms to railroads, so that business inventory in their hands is fully exempt. We could argue at further length whether those policies, if legitimate when the inventory is small or the timber is less valuable, suddenly become illegitimate when their value rises to a certain level. And we could debate whether the tax burden shifted to a railroad by a State's system of exemptions for non-railroad property is "discriminatory" in any sense that should concern Congress. Finally, the parties could each make their case for whether railroads should be relieved of any obligation to pay taxes, or whether some other relief is more in keeping with an "exemption discrimination" claim.

The essential point is not who would win or lose the debate, or what middle ground could be found between the parties' positions. The point is that the debate has never occurred. As we argued in our opening brief (Pet. Br. 33), the States must look to the political process for protection of sensitive interests such as their taxing authority, and that process, complete with its compromises and limitations, must be respected. *See generally*

[32] AAR Am. Br. 9.

Garcia v. San Antonio Metropolitan Transit District, 469 U.S. 528, 550–52 (1984). If the railroad industry believes that Congress's policy was short-sighted and that some other policy should be in place, Congress, not this Court, is the appropriate forum for that argument.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit.

Respectfully submitted,

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